FOR ARGUMENT

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No. 94-455

In The

Supreme Court of the United States

October Term, 1994

TYSON JOHNSON, ROBERT DEEVEY
AND JOHN PAYNE,

Petitioners,

v.

HOUSTON JONES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a district court's refusal to grant summary judgment to a defendant who asserts a defense premised entirely upon a denial of committing any wrong, although otherwise unappealable, may be appealed immediately as a collateral order if the defendant is a public official who also asserts a qualified immunity defense.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT 2

SUMMARY OF ARGUMENT 7

ARGUMENT 10

A. PETITIONERS' ASSERTION THAT A DEFENDANT WHO DENIES VIOLATING THE LAW AT ALL MAY ASSERT QUALIFIED IMMUNITY AT BEST IS AN INCOMPLETE STATEMENT OF THE APPLICABILITY OF QUALIFIED IMMUNITY OR IF TAKEN IN ITS BROADEST SENSE, A DEFENDANT WHO DENIES VIOLATING THE LAW IS SIMPLY ASSERTING A DEFENSE OF NO WRONG DOING AND IS NOT COLLATERAL TO THE MERITS AND THEREFORE IS NOT A QUALIFIED IMMUNITY ISSUE AT ALL 10

B. PETITIONERS' POSITION THAT A DEFENSE OF "I DIDN'T DO IT" IS A QUALIFIED IMMUNITY DEFENSE IS ERRONEOUS AND THEIR ADDITIONAL PROPOSITION THAT A DEFENSE OF "I DIDN'T DO IT" MAY BE RAISED ON AN INTERLOCUTORY APPEAL IS NOT CONSISTENT WITH THIS COURT'S DECISIONS ON THIS ISSUE AND WOULD BE CONTRARY TO THE MEANING OF QUALIFIED IMMUNITY, THE COLLATERAL ORDER DOCTRINE ANNOUNCED IN *COHEN*, AND THE FINALITY DOCTRINE 16

TABLE OF CONTENTS – Continued

Page

C. THE COURT OF APPEALS RULE CAN BE MEANINGFULLY APPLIED 25

CONCLUSION 32

TABLE OF AUTHORITIES

Pages

CASES

Alexander v. City and County of San Francisco, 29 F.3d 1355 (9th Cir. 1994) 18, 31

Anderson v. Creighton, 483 U.S. 635 (1987) 7

Anderson v. Liberty Lobby, 477 U.S. 272 (1986) 31

Bever v. Gilbertson, 724 F.2d 1083 (4th Cir. 1984) 17

Brisk v. City of Miami Beach, Fla., 726 F.Supp. 1305 (S.D. Fla. 1989) 18

Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972) 6, 27

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 9, 16, 17, 21

Elliott v. Thomas, 937 F.2d 338 (7th Cir. 1991), cert. denied, 112 S.Ct. 1242 (1992) 7, 11, 14, 26, 31

Evans v. Dillahunty, 711 F.2d 838 (8th Cir. 1983) 17

Flanagan v. United States, 465 U.S. 259 (1984) 16

Giuffre v. Bissell, 31 F.3d 1241 (3rd Cir. 1994) 31

Harlow v. Fitzgerald, 475 U.S. 800 (1982) ..... *passim*

Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) ..... *passim*

Rascon v. Hardiman, 803 F.2d 269 (7th Cir. 1986) 27

Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985) 19

Siegert v. Gilley, 500 U.S. 226 (1991) 25

Unwin v. Campell, 863 F.2d 124 (1st Cir. 1988) 25

TABLE OF AUTHORITIES – Continued

Page

Wilson v. City of Chicago, 707 F.Supp. 379 (N.D.Ill. 1989) 6

Yang v. Hardin, 37 F.3d 282 (7th Cir. 1994) 6, 27

STATUTES

42 U.S.C. § 1983 .....2, 24

28 U.S.C. § 1291 .....2, 21

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet.App.1a-3a) is reported at 26 F.3d 727. The opinion of the district court (Pet.App.4a-10a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1994. The petition for a writ of certiorari was filed on September 12, 1994, and was granted on January

6, 1995. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1291 provides in relevant part: "The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * * ."

42 U.S.C. § 1983 provides in relevant part: Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory * * * subjects * * * any citizen of the United States * * * to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law * * * ."

STATEMENT

1. On November 6, 1990, HOUSTON JONES had just purchased a few items at a grocery store near his residence after work and walked through the store parking lot to his vehicle. When he arrived at his car, he began experiencing physical manifestations of hypoglycemia, or more commonly known as insulin reaction. HOUSTON JONES proceeded to a muffler shop which was behind the store's parking lot and was found there by the muffler shop attendant hitting his forehead against an aluminum back door to the shop. Pet.App.5a. John Heidelmeier, an officer of the Villa Park, Illinois, Police Department,

responded to the report of an apparently intoxicated man at a muffler shop. When Heidelmeier arrived at the scene, he found HOUSTON JONES hitting his forehead against the aluminum door of the muffler shop building. Heidelmeier then approached HOUSTON JONES in an attempt to ascertain whether there was a problem. Pet.App.5a.

Unable to obtain a coherent response from HOUSTON JONES, Heidelmeier assumed he was intoxicated and decided to arrest him. Pet.App.5a. Upon reaching for HOUSTON JONES, who was faced away from Officer Heidelmeier, HOUSTON JONES swung a hand backwards at Heidelmeier. Heidelmeier then placed HOUSTON JONES in an arm lock and slammed him to the ground. Four more Villa Park police officers soon arrived and participated in the arrest. Pet.App.5a. From this point, the parties' version of the facts diverge.

HOUSTON JONES remembers specifically Officers Esposito and Heidelmeier administering repetitive blows and verbal abuse to him at the police station.[1] After a significant period of time at the station, Officer PAYNE, a petitioner in this appeal, suggested that an ambulance be called. HOUSTON JONES was then taken to the hospital and treated for multiple trauma and several broken ribs. Pet.App.5a. He remained in the hospital for several days recovering from his injuries.

HOUSTON JONES was charged in State court with the criminal offenses of disorderly conduct, battery upon

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[1] Officers Esposito and Heidelmeier were not part of the appeal taken to the Circuit Court of Appeals.

a police officer, and resisting arrest. At the trial in State court, his physician testified that as a consequence of him experiencing an insulin reaction at the time of his arrest, his recollection of relevant events would be very poor and he would probably have been greatly weakened. Pet.App.6a. However, according to his doctor, during an insulin reaction, he could be coherent for brief periods of time and could engage in conversation and control motor functions. Pet.App.6a. His coherence at the police station is evident in that the police officers' reports state that he was telling them, at that time he was a veteran of war and that he is a diabetic and needed medical assistance. The State trial court acquitted Houston Jones of the criminal charges brought against him finding that it was not proved beyond a reasonable doubt that Houston Jones had the mental capacity to commit the crimes of which he was charged. Pet.App.6a.

HOUSTON JONES then brought this civil rights action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Northern District of Illinois against petitioners, JOHNSON, DEEVEY and PAYNE, and also against Officers Heidelmeier and Esposito, who are not part of this appeal. In relevant part, HOUSTON JONES alleged that the officers who are the Petitioners in this appeal, condoned the use of excessive force against him and that they were responsible because the beatings and abuse occurred in their presence.

The parties engaged in discovery during which time the depositions of the plaintiff and all of the defendants were taken. The officers denied that they beat, struck or abused the plaintiff during the arrest or at the police station. These denials are contrary to and directly in the

face of their own admissions and police reports which show that they were the only officers engaged in the arrest and post-arrest processing at the station. The denials are also inconsistent with the medical evidence and other circumstantial evidence in the record which points to their involvement. Their roles at the station varied, but it became evident that they were all present at some point during the period of time which HOUSTON JONES testified the abuse occurred. Pet.App.5a, 7a. The officers have also stated in their reports and at their depositions that it was a tremendous struggle to subdue HOUSTON JONES because of his super-human strength; however, that testimony was directly contradicted by a medical doctor at the criminal trial who testified that a person suffering insulin reaction would be in a significantly weakened physical condition.[2]

Petitioners Johnson, Deevey and Payne moved for summary judgment, on the Plaintiff's excessive force claim, arguing that there was not a scintilla of evidence that they had abused HOUSTON JONES at the scene of the arrest or in a police station. The district court denied the motion finding that there was sufficient circumstantial evidence supporting the plaintiff's theory of the case against these defendants. Pet.App.8a. The district court followed the law in the Seventh Circuit which is that even if a police officer does not actually participate in a beating, a jury may consider an excessive force claim against him if the officer stood by and allowed others to beat the

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[2] The transcript of the state court criminal proceedings and trial was part of the record on summary judgment and these materials were provided to the district court judge.

plaintiff. *Byrd v. Brishke*, 466 F.2d 6 (7th Cir. 1972); *Wilson v. City of Chicago*, 707 F.Supp. 379 (N.D.Ill. 1989). This law has recently been affirmed in the case *Yang v. Hardin*, 37 F.3d 282 (7th Cir. 1994).

2. Petitioners, Johnson, Deevey, and Payne, filed an interlocutory appeal challenging the denial of summary judgment. The appeal asserted the defense of qualified immunity and basically reiterated their position that not a scintilla of evidence exists that petitioners, Johnson, Deevey or Payne, ever struck, punched or kicked the plaintiff, or observed anyone striking, punching or kicking the plaintiff. Pet.App.2a. The veracity of these allegations was directly challenged by the plaintiff in his response to the defendants' motion for summary judgment and is belied by the ample circumstantial evidence. The court of appeals properly dismissed the appeal as to the excessive force claim for lack of jurisdiction. The court of appeals determined that whether these police officers beat the plaintiff or whether they were in the presence of said beatings must be resolved in the district court before it may be reviewed on appeal. Pet.App.2a. The court of appeals correctly found that a cry of "We didn't do it" does not present any distinct legal issue or seek protection from legal uncertainty, the genesis of doctrines of official immunity. Pet.App.1a, 2a.

The court of appeals reasoned that it was being asked to do nothing other than address an exclusively factual question and was being asked to make a determination that the district court improperly found that there were questions of fact as to whether these petitioners are liable for the alleged abuses to the respondent. The court of appeal's holding in this case followed from its prior

decision in *Elliott v. Thomas*, 937 F.2d 338 (7th Cir.1991), cert. denied, 112 S.Ct. 1242 (1992).

The question presented in *Elliott* was whether a court's refusal to grant summary judgment to a defendant who denies committing any wrong may be appealed immediately as a collateral order on the authority of *Mitchell v. Forsyth*, 472 U.S. 511 (1985). The court in this case, as it did in *Elliott*, reasoned that to state this question is to answer it. A defense of no wrong doing is not collateral to the merits; it is the nub of the case. The court of appeals held that it lacked jurisdiction to entertain the petitioners' interlocutory appeal. Accordingly, the appeal was dismissed as to the excessive force claim brought in the guise of a qualified immunity defense and the case was remanded for trial.

SUMMARY OF ARGUMENT

In *Harlow v. Fitzgerald*, 475 U.S. 800 (1982), this Court articulated the doctrine of qualified immunity. In that decision and in *Anderson v. Creighton*, 483 U.S. 635 (1987), this Court ruled that a public official who does not violate the law, as it has been "clearly esatablished" at the time, is entitled to a dismissal of claims against him before trial. Qualified immunity, as authored by this Court, establishes a right to a disposition on the merits without trial.

In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), it was determined that qualified immunity is an entitlement not be forced to trial regarding the claim of official misconduct on the basis that is conceptually distinct from the

merits of a plaintiff's complaint that he has been damaged by a violation of his rights. *Mitchell v. Forsyth* established that a denial of this entitlement was appropriate for appellate review through an interlocutory appeal. In that opinion, the Court focused on the issues which arose as a result of the Attorney General who had violated "clearly established law." Under the facts supporting that decision, no real contest existed as to the facts regarding the actions alleged by plaintiff. Indeed, the Court noted that when reviewing a question of qualified immunity on interlocutory appeal, a court of review "need not consider the correctness of the plaintiff's version of the facts . . . All it need determine is a question of law." 472 U.S. at 528. Further, the *Mitchell* opinion notes that the denial of a claim to qualified immunity is immediately appealable "to the extent that it turns on an issue of law." 472 U.S. at 530.

Petitioners seek the right to take an interoluctory appeal of district court decisions concerning the existence of factual disputes that are not appealable in any other context. In the proceedings below, petitioners moved for summary judgment on the grounds that they denied committing the actions alleged in the complaint. Their motion for summary judgment did not rest on the ground that the law was not clearly established, nor any other legal issue associated with qualified immunity. Rather, their motion for summary judgment rested on a claim that the alleged misconduct never occured – a claim that may be presented whenever the defendant denies the plaintiffs' allegations, regardless of whether or not qualified immunity is an issue.

It has long been recognized that where, as here, a district court denies such a summary judgment motion because it finds that material facts are in dispute, that decision is not subject to interlocutory appeal because it is so closely tied to the merits. Petitioners' claim that this Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511 (1985) created an exception to this rule is misplaced because the legal issues concerning whether the law is "clearly established" under the qualified immunity doctrine are not at issue here. Rather, petitioners' challenge the district court's decision rests solely on the whether the factual record was sufficient to support summary judgment, an issue that is unrelated to the qualified immunity issue that this Court held was subject to appeal in *Mitchell*.

The collateral order doctrine announced in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) also does not provide appellate jurisdiction for petitioners' appeal because petitioners' claim is so closely tied to the merits. Indeed, petitioners' claim that they are entitled to summary judgment requires that the court determine the merits of their claim that they did not commit the wrongs alleged. Allowing immediate appeals of such decisions would require appellate courts to conduct interlocutory review of factual determinations by the district court that go directly to the merits of the underlying claim. Expanding the collateral order doctrine to permit such appeals would undermine the civil rights laws by expanding the ability of defendants to pursue multiple appeals. It would also burden the appellate courts with interlocutory appeals involving factual issues that are very different from the qualified immunity issue for which this Court authorized an interlocutory appeal in *Mitchell v. Forsyth*.

Petitioners' effort to create a special rule to allow their appeal must be rejected because it would transform the limited right to seek interlocutory review recognized in *Mitchell v. Forsyth* into a right to appeal every denial of a summary judgment motion by a public official who disagrees with the district court's determination that the record is not sufficient to sustain a motion for summary judgment. The expense, delay and use of judicial resources, involved in weighing the sufficiency of the evidence in such appeals will far outstrip any benefit to be gained by allowing such a procedure.

ARGUMENT

A. PETITIONERS' ASSERTION THAT A DEFENDANT WHO DENIES VIOLATING THE LAW AT ALL MAY ASSERT QUALIFIED IMMUNITY AT BEST IS AN INCOMPLETE STATEMENT OF THE APPLICABILITY OF QUALIFIED IMMUNITY OR, IF TAKEN IN ITS BROADEST SENSE, A DEFENDANT WHO DENIES VIOLATING THE LAW IS SIMPLY ASSERTING A DEFENSE OF NO WRONG DOING AND IS NOT COLLATERAL TO THE MERITS AND THEREFORE IS NOT A QUALIFIED IMMUNITY ISSUE AT ALL.

The petitioners have set forth a vague and incomplete proposition in asserting that qualified immunity applies to a defendant who denies violating a law at all. This statement can be viewed in one of two ways. First, a defendant can certainly assert a qualified immunity defense by denying he violated the law *if* the law was not clearly established at the time the alleged violation took place or that the defendant was acting in the shadow of

legal uncertainty. *Mitchell v. Forsyth,* 472 U.S. 511 (1985). Second, if the petitioners' point is that their denial of violating the law at all is premised on the argument that they did not commit the acts alleged, this would not be a qualified immunity defense. This is simply stating a defense of no wrong doing which is not collateral to the merits. *Elliott v. Thomas,* 937 F.2d 338 (7th Cir. 1991).

This Court would agree that a defendant who denies violating the law can assert a qualified immunity defense *if* the law which was allegedly violated was not clearly established or the defendant was acting in the shadow of legal uncertainty. However, it appears that the petitioners have taken this concept well beyond its rationale by mistakenly interpreting a statement in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). The petitioners have extracted a statement from *Harlow* where this Court said:

> "We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate established statutory or constitutional rights of which a reasonable person would have known." *Harlow,* 457 U.S. at 818.

Petitioners have interpreted this to mean that immunity protects a group of defendants who did not violate the law at all either because they did not commit the acts alleged or because those acts are lawful. Nowhere in the *Harlow* decision or holding was there a rule proposed, or even a discussion had, that delineated a grouping of defendants who deny any wrongdoing as falling into a potential qualified immunity category. This Court, in *Harlow,* addressed whether there was a workable procedure

to obtaining the goal of qualified immunity. This Court found that the standard of what needed to be shown was not workable and announced a standard that *eased* the burden placed on public officials asserting this defense by eliminating the necessity of exploring the subjective element of whether the official utilized good faith in carrying out the law as he understood it. *Harlow*, 457 U.S. at 818. Having dismissed this element, the Court held that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate *clearly established statutory or constitutional rights* of which a reasonable person would have known. *Harlow*, 457 U.S. at 818. *Harlow* simplified the issue so that a district court did not have to inquire into disputed fact questions in order to determine if a valid qualified immunity defense exists. In this respect, it was added that:

> "Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly establish law should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful . . . If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public

> official should know the law governing his conduct."

Harlow, 457 U.S. at 818.

This Court's holding in *Harlow* clearly and unequivocally expresses that there has to be a determination as to whether the law was clearly established at the time of the alleged violation. Nowhere in this holding can it be found that *Harlow* stands for the proposition that a defendant who denies violating the law at all or that he didn't do the acts complained of, may assert this "no wrongdoing" defense under the guise of a qualified immunity assertion. Also entangled in the petitioners' theory that a defendant who denies violating the law at all is entitled to a qualified immunity defense, is their proposition that this would help to alleviate the burdens on defendant officials and society as a whole. They have also cited *Harlow* for this proposition. As discussed above, *Harlow* did not say this at all. *Harlow* did in fact ease the burden on defendants in these cases. The subjective element of the good faith defense frequently had proved to be incompatible with this Court's admonition in that insubstantial claims should not proceed to trial. This, in fact, allowed an easier vehicle for district court judges to have insubstantial and unmeritorious claims thrown out before or during the discovery stage. This Court in *Harlow* never extended the qualified immunity defense as far as the petitioners are suggesting and never did this Court in *Harlow* suggest that a qualified immunity defense should be considered the same as a defense of no wrongdoing as the petitioners suggest.

The petitioners have also proposed that "defendants who deny violating the law at all" are entitled to a

qualified immunity defense collateral to the merits of the case. They have done so by blanketly asserting that courts of appeals have considered the factual backgrounds of other claims in deciding whether a clearly established law has been violated. The fact that a court may have to review the factual background of a particular case in determining whether a qualified immunity defense applies is by no means dispositive as to whether a legitimate qualified immunity defense has been asserted.

As the court in *Elliott* stated "facts do play a role in these types of appeals". *Elliott*, 937 F.2d at 342. It is impossible to know which clearly established rules of law to consult unless you know what is going on. The reason a court of appeals examines the facts is to determine whether it was clearly established at the time that such deeds were forbidden. To say that the reviewing court must, at least in some circumstances, review the facts of a case is not to say that this should also allow a reviewing court in an interlocutory appeal to *decide and rule upon* issues of fact. Therefore, the petitioners are mistaken in their interpretation as to the reason reviewing courts have examined the facts in deciding whether a defendant should be qualifiedly immune for an alleged violation of the law. This Court in *Mitchell v. Forsyth*, with respect to this issue, stated:

> "An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether

> the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly prescribed the actions the defendant claims he took."

Mitchell, 472 U.S. at 528.

One would be extremely strained to find anywhere in this Court's summation in *Mitchell* that qualified immunity concerns are identical to a situation where a defendant has denied violating the law at all. A denial of violating the law without an accompanying assertion that there was uncertainty in the law is simply an "I didn't do it" defense. This is not a qualified immunity assertion; it is simply a defense to the merits.

Petitioners' position that qualified immunity protects those who claim "we didn't violate the law" absent an evaluation of whether the law was clearly established is not supported by this Court's decisions or the majority of circuit court of appeals decisions concerning this issue. It is clear that the issue the petitioners are addressing when they attempt to bootstrap a qualified immunity defense with an assertion of "they didn't violate the law at all", is simply an issue of the innocence or guilt of the defendant. Any defendant can plead innocence or guilt. However, the assertion of innocence or guilt has nothing to do with whether there exists a qualified immunity issue *collateral* to the merits of the case.

B. PETITIONERS POSITION THAT A DEFENSE OF "I DIDN'T DO IT" IS A QUALIFIED IMMUNITY DEFENSE IS ERRONEOUS AND THEIR ADDITIONAL PROPOSITION THAT A DEFENSE OF "I DIDN'T DO IT" MAY BE RAISED ON AN INTERLOCUTORY APPEAL IS NOT CONSISTENT WITH THIS COURT'S DECISIONS ON THIS ISSUE AND WOULD BE CONTRARY TO THE MEANING OF QUALIFIED IMMUNITY, THE COLLATERAL ORDER DOCTRINE ANNOUNCED IN *COHEN*, AND THE FINALITY DOCTRINE.

The petitioners attempt to expand the doctrine of qualified immunity to mean that a defendant who denies violating any law at all may assert qualified immunity and have argued the next step that this type of defense, *i.e.*, "I didn't do it" may be raised on an interlocutory appeal. This argument is unsupported in the law.

Petitioners cite *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), for the proposition that they have a right to an interlocutory appeal under these circumstances under the collateral order doctrine expressed in *Cohen*. In *Cohen*, this Court recognized a "small class" of decisions which finally determined claims of rights separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. *Cohen*, 337 U.S. at 546. Such orders warrant immediate review despite the final judgment rule which requires that a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits. *Flanagan v. United States*, 465 U.S. 259 (1984).

To qualify under *Cohen's* collateral order doctrine, an order must satisfy a three-part test. First, it must conclusively determine the disputed question in the trial court. *Bever v. Gilbertson*, 724 F.2d 1083 (4th Cir. 1984). The order cannot be subject to any further proceedings at the trial level either before, during, or after the appeal. Second, it must resolve an important question separable from, and collateral to, the merits of the litigation. *Evans v. Dillahunty*, 711 F.2d 838 (8th Cir. 1983). Finally, the order must be effectively unreviewable on appeal from the final judgment: it must involve a right which would be lost or deprived of its practical value if immediate appeal were not available. *Bever*, 724 F.2d at 1087.

Petitioners' assertion that this doctrine has been satisfied where a defendant cries "I didn't do it" is faulty at a glance at the second requirement of the collateral order doctrine in that the question must be separable from, and collateral to, the merits of the litigation. There is nothing to review collaterally when a cry of "I didn't do it" is at issue because this is nothing more than a defense on the merits claiming innocence. Therefore, petitioners' reliance upon the doctrine announced in *Cohen* is misplaced.

Petitioners also mistakenly assert that the *Cohen* doctrine allows an appeal to a whole category of qualified immunity cases, *i.e.*, not just those that involve a legal question. This is inconsistent with *Cohen's* analysis that there is a very small class of decisions which finally determined claims of rights separable from, and collateral to, the rights asserted in the action. This is why the Seventh Circuit Court of Appeals has held that such an assertion does not involve immunity at all because it is

not collateral to the merits. It is simply a defense of no wrongdoing. As a matter of semantics and misreading of this Court's decisions on this issue, petitioners have attempted to broaden the scope of a qualified immunity defense to the point where a no wrongdoing defense on the merits should be viewed as the same thing as a defense of qualified immunity. Qualified immunity, however, has been consistently held, if in fact it is properly asserted, to be completely collateral to the merits of the case.

It seems that the crux of petitioner's argument is that the circuit courts of appeal should be allowed to review a district court's finding, after a review of the depositions, pleadings and other factual matter contained in the record, that there exists a question of fact as to whether the defendant did the acts alleged. There are several serious problems with this proposition.

First, it is a jury question to decide the ultimate facts which are in dispute. *Alexander v. City and County of San Francisco,* 29 F.3d 1355 (9th Cir. 1994); *Brisk v. City of Miami Beach, Fla.,* 726 F.Supp. 1305 (S.D.Fla. 1989). Also, contrary to the petitioners' assertion, there would be additional appeals that would load the appellate docket in the circuits to an unmanageable and unrealistic level. Allowing interlocutory appeals to determine whether the district court properly determined whether the evidence is sufficient for summary judgment would disrupt the district court litigation and multiply the opportunity for repetitive appeals that burden the appellate courts. Further, if defendants are allowed to take such appeals, they may take more than one appeal. For example, if the district court denies a summary judgment motion and the

court of appeals affirms on the basis that the record is inadequate to support summary judgment, and the defendant then submits additional affidavits, depositions, or other evidence and renews the summary judgment motion on the basis that he or she has caused the deficiencies in the original motion, petitioners' theory suggests that the defendant would be entitled to a second appeal if the renewal motion is also denied. It would also require circuit courts of appeals to look over the shoulder of the district court every step of the litigation which would disrupt its function in quickly resolving these matters and moving them through the court system in an expeditious manner. This case is a perfect example. It is 1995 and the plaintiff has not had his day in court concerning an incident which occurred in 1990 with a lawsuit on file since 1991. It would also lead to an exercise in futility and would perhaps lead to many frivolous appeals as the district court is upheld most of the time. *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985).

The question of law contemplated by *Harlow* and *Mitchell* appropriate for an interlocutory appeal where a qualified immunity defense is asserted is whether or not the law that was allegedly violated was clearly established at the time the incident occurred. The issues that this Court held were subject to interlocutory review in *Mitchell* are not only distinct from, but very different from, the issues presented here because the issues presented here are far more fact-intensive and difficult for an appellate court to review. The issue of whether the law is "clearly established" is a legal issue that requires the appellate court to review the district court's reading of the case law, statutes, etc. The issue of whether the record

is sufficient to support summary judgment, on the other hand, requires intimate knowledge of the record to assess whether there are factual disputes concerning material elements of the case. Even if the issue of the sufficiency of the evidence for summary judgment, is, in some respect, a "legal issue," it is an issue that requires a detailed assessment of the factual record that is *not* required to review whether the law was clearly established. Expanding *Mitchell* to cover appeals of defendants' denials of the factual allegations would involve the appellate courts in intense review of the factual record that was never contemplated in *Mitchell.* Never has it been stated that a question of law which should be entertained is whether or not the district court correctly or incorrectly found the existence of a question of fact as to whether the defendants' did or did not perform the acts alleged. A distinct danger of addressing the case on the merits would be readily apparent if an appellate court were allowed to second-guess a district court judge's determination that a question of fact exists as to whether the defendants did the acts alleged. The appellate court would not be as familiar as the district judge with the often complex and voluminous record at summary judgment.

Allowing interlocutory appeals under these circumstances would impose costs on civil rights plaintiffs that undermine the enforcement of the civil right laws. *Harlow* and *Mitchell* emphasize the need to balance plaintiffs' rights against the interest in protecting defendants from frivolous claims but, if defendants are permitted to appeal any adverse determination that may be dispositive, they would be able to thwart the ability of plaintiffs with legitimate claims to get to trial. It would place too

much of a burden on Civil Rights plaintiffs with legitimate claims. This case is a perfect example of a situation where the plaintiff has not had his day in court and it has been almost five years. The Civil Rights Act is intended as a vehicle for citizens to go up against large municipalities and municipal departments when their civil and constitutional rights have been abused. It is a law which is designed to insure that the rights of victims of civil rights abuses are preserved.

Concerns with respect to *Cohen* were addressed in Justice Brennan's dissent in *Mitchell.* Justice Brennan expressed that denials of qualified immunity, at least where they rest on undisputed facts, are generally not appealable. *Mitchell,* 472 U.S. at 543, Brennan J., dissenting, Justice Brennan noted that this Court has always read the *Cohen* collateral order doctrine narrowly, in part because of the strong policy supporting the §1291 Final Judgment Rule. The rule respects the responsibilities of the trial court by enabling it to perform its function without a court of appeals peering over its shoulder every step of the way. It preserves scarce judicial resources that would otherwise be spent in costly and time consuming appeals. *Mitchell,* 472 U.S. at 544, Brennan J., dissenting. Equally important, the final judgment rule removes a potent weapon of harassment and abuse from the hands of litigants. *Mitchell,* 472 U.S. at 544, Brennan J., dissenting. Similarly, where a pre-trial issue is closely related to the merits of a case and interlocutory review is permitted, post-judgment appellate review is likely to require the appellate court to re-examine the same or similar legal issues. This would lead to repetitious appellate review. *Mitchell,* 472 U.S. at 549, Brennan

J., dissenting. Justice Brennan also concluded that even if there were some benefits to be gained by granting officials a right to immediate appeal under these circumstances, such is that in the case at bar, a rule allowing immediate appeal imposes enormous costs on plaintiffs and on the judicial system as a whole. It also imposes costs on the defendant officials and the public. Those who pursue interlocutory appeals can be expected ordinarily to lose. Finally, Justice Brennan observed that if factual determination type of appeals are to be allowed interlocutorily, it would effectively result in the denial of full and speedy justice to those plaintiffs with strong claims on the merits and a relentless and unnecessary increase in the case load of appellate courts. *Mitchell*, 472 U.S. at 556, Brennan J., dissenting.

There is a distinction between saying, "I'm innocent" and "I'm immune." Qualified immunity protects those who acted in the shadow of uncertainty but it does not protect those who merely claim innocence and take issue with the factual claims asserted by the plaintiff which go directly to the merits of the claim. It is true that some courts have accepted that you must review facts to determine if the defendant acted in the shadow of legal uncertainty but this is not the same as what is proposed by the defendant.

The petitioners have also attempted to draw a distinction between saying that a defendant who bases an immunity claim on the law not being established is something different than saying he didn't violate the law. There is no distinction; this is saying the same thing. The circuit courts of appeals, when they decide that a defendant is entitled to qualified immunity, do so because the

law was not clearly established and, therefore, are in effect deciding simultaneously that the defendant did not break the law. No court of appeal has broken this concept into a two-part analysis which the petitioners urge this Court to do. That is, decide if the defendant has broken the law and then decide if the law was clearly established.

Additionally, the petitioners are saying that immunity is conceptually distinct from the merits. This can be true when the law is not clearly established but their argument fails when the immunity defense is based entirely on a denial of the facts. At this point, it really is not an immunity defense at all, it is a defense to the merits guised as an immunity defense.

Along this line, courts have also addressed whether it is actually a question of law to determine if the district court properly found "sufficient evidence" that the defendants committed the alleged violative acts. It should be noted that if this is considered a question of law, it was never the type of question of law that is addressed in deciding if qualified immunity applies to a particular case, *i.e.*, whether the law at issue was clearly established at the time of the alleged acts.

Allowing appellate jurisdiction to decide if there is sufficient evidence to support a plaintiff's claim is asking appeals courts to review purely factual determinations in the course of a qualified immunity interlocutory appeal. This again would be improper because the only question would be whether a district court correctly decided to send a factual issue to the jury. To permit interlocutory

appeals of evidence sufficiency questions will create difficult practical problems. Factual issues in §1983 cases are often complex. Deciding whether the evidence is sufficient to go to the jury in such cases can take many hours of reading depositions, interrogatory answers, and other record material, filled with indeterminate or dubious statements. District courts are often required to sort out complex records to make determinations on summary judgment, and the appellate court should not be required to repeat this review by giving the defendant an appeal as of right. Further, this should be addressed as an issue of sufficiency of the evidence at trial, not sufficiency of the often less comprehensible documentary evidence presented at the summary judgment stage. This Court must recognize the power of the district court to decide, for administrative reasons, the most efficient course of action to take with their assigned matters.

To permit a defendant to appeal an evidence sufficiency issue prior to trial would seriously undermine the district court's case management powers. Also, allow an interlocutory appeal on these grounds would be anomalous to let a defendant force both a district court and an appeals court to pour over a complex record to decide whether the evidence is sufficient to go to a jury. This would not be practical. Additionally, it would be difficult to reconcile this Court's cautions against hastily granting summary judgment if a district court knows that a defendant will immediately appeal, before trial, a decision to send a doubtful case to the jury. In light of these practical considerations this Court meant in *Mitchell* what it said, namely, that a qualified immunity issue is immediately appealable only when it presents a question of law other

than the question whether the evidence was sufficient to raise a jury question about a particular fact. See *Unwin v. Campell,* 863 F.2d 124 (1st Cir.1988), Breyer J., dissenting.

Not only would there be the practical problems previously addressed in this brief if an immediate appeal is allowed every time a qualified immunity defense is raised in the context of a purely factual issue, it would also ask the circuit courts of appeal to create new law in the area as to what constitutes "sufficient evidence" for a case to go to a jury. The appellate court would have to ask the question as to whether one fact, two facts, ten facts, or whether circumstantial evidence alone, is "sufficient evidence" to go to a jury. The appellate court in many or all instances would be required to evaluate which facts they think a jury might find the most compelling. The task would be one never seen in the law before, *i.e.,* the question of what constitutes sufficient evidence to cross a certain threshold for a case to be allowed to go to a jury. This would not be an effective use of the time and resources of our appellate courts.

C. THE COURT OF APPEALS RULE CAN BE MEANINGFULLY APPLIED

The Seventh Circuit's resolution of these issues in the instant opinion is drawn directly from language in *Mitchell v. Forsyth.* The Court's reliance on "legal uncertainty" as the indispensable component of an immunity claim is in harmony with this Court's definition of such claims. In *Siegert v. Gilley,* 500 U.S. 226 (1991), this Court specifically notes:

> "Decision of this purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suits on its merits. One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit."

500 U.S. at 232.

In *Elliot v. Thomas*, 937 F.2d 338 (1991), the Seventh Circuit discussed the need to confine interlocutory appeals to cases in which that issue is to be resolved. The Court noted that:

> "Yet the reason a Court of Appeals examines the facts is to determine whether it was clearly established at the time that such deeds were forbidden. Anderson, 483 U.S. at 641. It would extend Mitchell well beyond its rationale to accept an appeal containing nothing but a factual issue."

937 F.2d at 342.

On that basis, the Seventh Circuit has refused to extend an interlocutory appeal to a defense of "we didn't do it." Such an appeal requires resolution of the ultimate issues of fact, something not appropriately done without a trial and final judgment. The Seventh Circuit has not restricted itself to a review of the facts alleged in the Complaint.

In this case, the parties conducted discovery and participated in a completely briefed summary judgment before the Magistrate Judge in the District Court. That Court reviewed the submissions of the parties and described the facts of the occurrence as follows:

> At that point, Heidelmeier decided to place plaintiff under arrest and he forced plaintiff to the ground in order to handcuff him behind his back. Heidelmeier could not accomplish this task alone because of plaintiff's struggling. In the interim, the other individual defendants had arrived on the scene and they assisted Heidelmeier in handcuffing plaintiff and placing him a squad car. Defendants state that due to plaintiff's extreme resistance to their attempts to place him under arrest, it took the efforts of all five officers to control him.
>
> Defendants contend that no one struck, beat or abused plaintiff while in the parking lot where he was arrested. Defendants Johnson, Payne and Deevey add that at that point their involvement in the arrest ended and that they saw no one abuse plaintiff at the police station either. PX D-F. Shortly after Plaintiff arrived at the police station, paramedics were called. Plaintiff spend several days in the hospital for treatment of multiple trauma and broken ribs. DX A at 76; PXF.

The Court's opinion further recognizes the well-established law in the Seventh Circuit that a jury can find a defendant guilty of the excessive use of force if he stood by and watched other officers beat the plaintiff. *Byrd v. Brishke,* 466 F.2d 6 (7th Cir. 1972); (*See also, Rascon v. Hardiman,* 803 F.2d 269 (7th Cir. 1986); *Yang v. Hardin,* 37

F.3d 282 (7th Cir. 1994). Additionally, the Court noted that the plaintiff was able to describe recollections of pain at the time of his arrest.

Thus, the Court identified a specific issue of fact to be determined at trial. If a jury disbelieved the defendant's denials ("we didn't do it"), and determined that plaintiff's injuries resulted from excessive force applied at the time of his arrest, plaintiff could prevail without evidence as to which defendant struck him at a specific point in time. Thus, the District Court determined that an issue of fact remained for trial as to whether the defendants "did it."

On appeal, defendants attempted to block a trial on the basis that qualified immunity should prevent a trial as their claims of "we didn't do it" should be accepted as true. This is exactly what the Seventh Circuit had in mind when it noted that:

> "By slight of hand, you can turn any defense on the merits into a defense of qualified immunity."

937 F.2d at 341.

The expansion of the rule in *Mitchell v. Forsyth* as proposed by these defendants will provide the opportunity for a motion based on qualified immunity and an interlocutory appeal in every case. If "we didn't do it" is acceptable as a basis for immunity to excessive force claims, then the next logical step is to allow defendants to allege they are immune as the force used in a case was reasonable. Under defendant's proposal, literally every claim against an official can be adjudicated on the basis of qualified immunity.

The Seventh Circuit's resolution of this case is workable as demonstrated by the Court's ruling on the issue of arrest without probable cause. The Court reviewed the record and found that as a matter of law, given the uncontradicted facts in the record, the officers had probable cause to arrest the plaintiff, thus, they need not stand trial on the plaintiff's Fourth Amendment claim. This resolution is demonstration enough that the Seventh Circuit's approach to such claims is clearly workable.

It is defendant's proposed expansion of interlocutory appeals that poses potential problems. If an interlocutory appeal is allowed on the basis that qualified immunity is appropriate due to lack of sufficient evidence in Section 1983 cases, it will become even more difficult to litigate such matter as every such case will require extensive discovery on all issues in the case, not just those linked to a determination of immunity.

In order to liquidate the issues involved in "we didn't do it", full discovery will be required. As in this case, when injuries are circumstantial proof of the use of excessive force, even medical discovery, will be required. This will defeat the stated purpose of immunity as a basis to halt discovery and pretrial proceedings and dispose of litigation at an early stage to protect defendants not only from judgment, but also from involvement in litigation.

In defining qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court stated:

> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the

> resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the current applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail since a reasonably competent public official should know the law governing his conduct.

457 U.S. at 819.

Nothing in *Harlow v. Fitzgerald* supports the concept that litigation regarding the merits of the case or the ultimate issues involved should be treated similarly to the issue of standard conduct measured by clearly established law.

It is petitioners proposal in this case which will create a rule that cannot be meaningfully applied. It will transform the limited appellate review provided by *Mitchell v. Forsyth* into an appeal of every summary judgment by a public official, who is not satisfied that sufficient evidence exists to require a trial. The expense, delay and use of judicial resources involved in weighing sufficiency of the evidence appeals will far outstrip any benefit to be gained by allowing such a procedure.

As a practical matter, a determination by a district court that an issue of fact as to sufficiency of the evidence

exists is rarely, if ever, overturned on appeal. Summary judgments are appropriate in only a small number of cases; indeed, this Court has cautioned against hastily granting such motions. *Anderson v. Liberty Lobby*, 477 U.S. 272 (1986). It is unlikely that courts of review will be hasty to overturn decisions to deny summary judgment relief. Most importantly, the type of litigation proposed would be completely removed from the separate issue of immunity which are hopelessly entangled with the merits of each case.

Circuit Courts have no problem whatsoever determining if immunity is appropriate under the standard announced by the Seventh Circuit in *Elliott v. Thomas*. In this case, the Court was able to discern the lack of any factual issues regarding probable cause and determine that the petitioners were immune from claims regarding arrest without probable cause.

Elliot v. Thomas was cited with approval by the Third Circuit in *Giuffre v. Bissell*, 31 F.3d 1241 (3rd Cir. 1994). In that case, the Court declined to review a denial of summary judgment to a defendant whose "I didn't do it" defense served only to refute Plaintiff's case-in-chief.

The Seventh Circuit's interpretation of the scope of *Mitchell v. Forsyth* is perfectly appropriate. It is not unworkable and no reason has been put forth to justify expanding the use of interlocutory appeals by in effect redefining qualified immunity.

CONCLUSION

The Seventh Circuit's holding in *Elliott* and in this case, is consistent with the mandate of this Court. *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). The holding best serves the interests of judicial economy, the purpose of the Civil Rights Act, and preserves the fair treatment and rights of victims of civil rights abuses. The court of appeals holding in this case also best serves the balancing and fair application of the competing interests of the final judgment rule, the collateral order doctrine, and the purpose of the doctrine of qualified immunity, *i.e.*, the right not to stand trial for actions taken in the shadow of legal uncertainty. Also, as amply demonstrated, the petitioner's argument that the Seventh Circuit's ruling in this matter cannot be meaningfully applied is mistaken. Therefore, the court of appeals' decision in this matter should be affirmed in all respects.

Respectfully submitted,

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